

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO
THE FLORIDA PROBATE RULES

CASE NO.: SC01-1859

**EMERGENCY RECOMMENDATIONS BY THE FLORIDA PROBATE
RULES COMMITTEE FOR AMENDMENTS TO
THE FLORIDA PROBATE RULES**

David R. Carlisle, Chair of the Florida Probate Rules Committee, and John F. Harkness, Jr., Executive Director of The Florida Bar, file these emergency recommendations for amendments to the Florida Probate Rules outside the two-year cycle report with the Court pursuant to Rule 2.130(e), Florida Rules of Judicial Administration.

The amendments to the Probate Rules are necessary to provide procedures to implement extensive revisions to the elective share statutes (§§732.201-732.2155, Florida Statutes), which are effective for all decedents dying on or after October 1, 2001. These amendments are presented as emergency recommendations because the effective date of the statutes precedes by over one year the next regular reporting cycle of this Committee. The present elective share rules do not provide adequate procedures to provide guidance to practitioners under the new statutes or provide due process to interested parties including direct recipients of property entering into the new elective estate from whom contribution may be sought. *See, §§732.2035, 732.2045 and 732.2085, Fla. Stat.*

The Committee proposes amendments to the rules as shown on the attached table of contents. The voting record for the committee for each amendment is shown in the table of contents. As required by Rule 2.130, Rules of Judicial Administration, the amendments have been reviewed by the Board of Governors of The Florida Bar. The board's vote on each amendment is shown on the table of contents. The appendix presents each proposed rule in two-column format. The Committee requests that the proposed rules be adopted effective October 1, 2001 to coincide with the effective date of the statutory revisions.

The amendments are proposed for the following reasons.

Overview of Statutory Changes.

Under the existing elective share law, a spouse may elect against the will of a decedent and be entitled to receive 30% of the probate estate. The existing law has been criticized because simple planning could reduce or eliminate the probate estate thereby defeating the surviving spouse's rights. *See, e.g., Friedberg v. Sun Bank/Miami, N.A.*, 648 So. 2d 204 (Fla. 3d DCA 1995); *Traub v. Zlatkiss*, 559 So. 2d 443, 446 (Fla. 5th DCA 1990). The new law greatly expands the types of property subject to the elective share. The new "elective estate," for example, encompasses revocable trusts, Totten trust accounts, pay on death accounts, jointly held property and other assets passing outside the probate estate. §732.2035, *Fla. Stat.* Once a valid election is made, the new law imposes duties on the personal representative to pursue contribution from third party direct recipients who have received or are in possession of property needed to satisfy, in whole or in part, the elective share. *See, §§732.2085, 732.2145, Fla. Stat.*

Overview of Proposed Amendments to the Florida Probate Rules.

The challenge for the committee was two-fold: (1) to prescribe who should have the burden of identifying and valuing the elective estate, and (2) to provide procedures for notice and an opportunity to be heard to all interested parties, including direct recipients from whom contribution might be sought, consonant with procedural and substantive due process. *See, Art. I, §9, Fla. Const.*

After considerable debate and consultation with the drafters of the statute, the committee concluded that the personal representative was best positioned to identify and value the elective estate because he or she would already possess most, if not all of the necessary information. The personal representative would have gathered information about all assets of the decedent, including non-probate assets, as part of his or her due diligence determination of whether the estate would be required to file an estate tax return. This tax due diligence would also require the personal representative to value all assets as of the date of the decedent's death. This duty to gather information may also be inferred from the express duty of the personal representative to pursue contribution in satisfaction of the elective share. *See, §732.2145, Fla. Stat.* This solution also offered simplicity and practicality as opposed to placing the burden on the electing spouse to engage in discovery from the personal representative and third parties in order to identify and value the elective estate.

To satisfy due process, notice and an opportunity to be heard must be afforded to interested persons whose interests could be affected by the election or by contribution. The Committee concluded that the due process concerns were different at the election stage as opposed to the determination of the elective estate and contribution. Consequently, the Committee proposes a bifurcated procedure: first,

a procedure for election (including election by the attorney in fact, or guardian of a surviving spouse) and for formal notice to interested persons of the election and a procedure for objecting to the election; second, a procedure for determination of the elective estate and contribution that would be a specific adversary proceeding under Rule 5.025, triggering formal notice or service of process on all interested persons and direct recipients and a hearing.

The proposed changes and further reasons are provided below.

Rule 5.025. ADVERSARY PROCEEDINGS.

Proceedings to determine pretermitted share and to determine amount of elective share and contribution are added as specific adversary proceedings under subdivision (a). This amendment is intended to invoke service of formal notice or service of process on all interested persons who might be affected by inclusion of certain property in the elective estate and who may be liable for contribution.

Rule 5.340. INVENTORY.

Subdivision (f) has been added to treat the personal representatives disclosure of the nature, value and possession of the elective estate as a special inventory. It is intended that this inventory would not be required to be served on taxing authorities, but would be confidential under section 733.604 (1) and (2), *Fla. Stat.* Subdivision (a) has been amended to conform to revisions to the Probate Code effective January 1, 2002.

Rule 5.360. ELECTIVE SHARE.

The amendments are a complete re-write of this rule to conform with the statutory amendments. Subdivision (a) provides for the filing of the election and a procedure for obtaining court approval when the election is made by an attorney in fact or guardian of a surviving spouse. This is consistent with section 732.2125, *Florida Statutes*.

Subdivision (b) sets forth the procedure for the election and service of formal notice of the election on interested persons. The Committee considered that the only possible objections to the spouse's election would be on grounds of untimeliness, invalidity or lack of a legal marriage, or waiver by pre- or post-nuptial agreement. Although formal notice is required to be served on interested persons, it is NOT a specific adversary proceeding, although any party may declare it to be an adversary proceeding. This procedure has the flexibility of being handled summarily or informally if there is no controversy over the entitlement of the spouse or if no objections are filed. This procedure is set forth in subdivision (c).

The procedure for determination of amount of elective share and contribution is set forth in subdivision (d). This proceeding is a specific adversary proceeding under Rule 5.025 and requires service of formal notice of the petition or service of a summons or other process on all interested persons, including direct recipients from whom contribution is or may be sought. The primary duty of bringing the petition is upon the personal representative, but may be brought by the surviving spouse if the personal representative fails to act within 90 days of rendition of the order of entitlement, under subdivisions (d)(1) and (d)(3). This is consonant with §732.2145, *Florida Statutes*. Subdivision (d)(2) requires that the inventory of the elective estate be served together with the petition. The requirements of the order of contribution are set forth in subdivision (d)(6). The statute contemplates an order of contribution, to

be followed in appropriate circumstances by entry of a judgment against anyone liable for contribution. *See, §732.2145, Fla. Stat.* It is unclear whether a separate proceeding would be required or if entry of the judgment would be automatic. The statute appears to treat the order of contribution as a judgment for purposes of statutory interest, *see, §732.2145(a)*, but elsewhere discusses obtaining a judgment for the amount of contribution specified in the order. *See, §732.2145(3) and (4), Fla. Stat.* The Committee has decided not to specify a specific procedure for reducing the order to a judgment at this time and leave it to be defined by the courts and general law.

Rule 5.365. PETITION FOR DOWER.

This rule is derived from and identical to existing Rule 5.360(e). It has been retained and set out as a new rule so that the procedures for enforcing pre-existing dower rights are not removed.

Wherefore, the Committee and The Florida Bar respectfully request that the court adopt these proposed amendments to the Florida Probate Rules, to be effective October 1, 2001.

Respectfully submitted this _____ day of August, 2001.

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